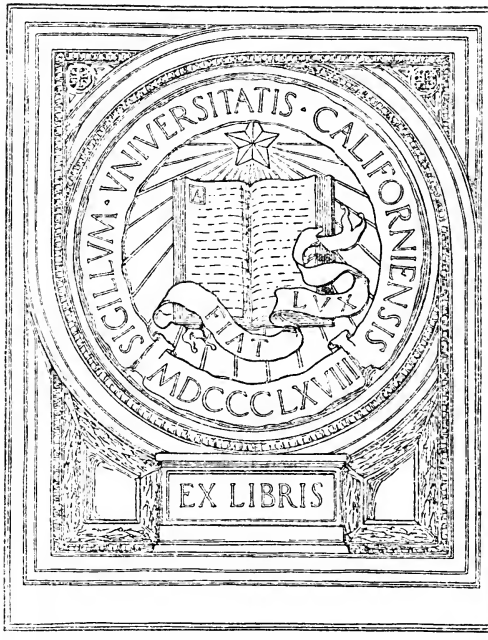

Field

# THE POWER OF THE STATE

TO

# CONTROL THE COMPENSATION

RECEIVABLE FOR

# THE USE OF PRIVATE PROPERTY,

AND FOR

# SERVICES IN CONNECTION WITH IT

# CONSIDERED.

U. S. Supreme court.

THE POWER OF THE STATE TO CONTROL THE COMPENSATION RECEIVABLE FOR THE USE OF PRIVATE PROPERTY, AND FOR SERVICES IN CONNECTION WITH IT, CONSIDERED.

# THE DISSENTING OPINIONS

OF

# MR. JUSTICE FIELD,

OF U. S. SUPREME COURT,

IN

# THE CHICAGO ELEVATOR CASE,

AND

# THE GRANGER CASES,

DECIDED MARCH, 1877.

# SUPREME COURT OF THE UNITED STATES.

## "The Chicago Elevator Case."

Ira Y. Munn and George L. Scott, Plaintiffs in Error, vs. The People of the State of Illinois. } Error to the Supreme Court of the State of Illinois.

Mr. Justice FIELD dissenting.

I am compelled to dissent from the decision of the court in this case, and from the reasons upon which that decision is founded. The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference; and is in conflict with the authorities cited in its support.

The defendants had constructed their warehouse and elevator in 1862 with their own means, upon ground leased by them for that purpose; and from that time until the filing of the information against them, they had transacted the business of receiving and storing grain for hire. The rates of storage charged by them were annually established by arrangement with the owners of different elevators in Chicago, and were published in the month of January. In 1870, the State of Illinois adopted a new constitution, and by it "all elevators or storehouses where grain, or other property, is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

In April, 1871, the legislature of the state passed an act to regulate these warehouses, thus declared to be public, and the warehousing and inspection of grain, and to give effect to this article of the constitution.

By that act, public warehouses, as defined in the constitution, were divided into three classes, the first of which embraced all warehouses, elevators, or granaries located in cities having not less than one hundred thousand inhabitants, in which grain was stored in bulk, and the grain of different owners was mixed together, or stored in such manner, that the identity of different lots or parcels could not be accurately preserved. To this class the elevator of the defendants belonged. The act prescribed the maximum of charges, which the proprietor, lessee, or manager of the warehouse was allowed to make for storage and handling of grain, including the cost of receiving and delivering it, for the first thirty days or any part thereof, and for each succeeding fifteen days or any part thereof; and it required him to procure from the circuit court of the county a license to transact business as a public warehouseman, and to give a bond to the people of the state in the penal sum of ten thousand dollars for the faithful performance of his duty as such warehouseman of the first class, and for his full and unreserved compliance with all laws of the state in relation thereto. The license was made revocable by the circuit court upon a summary proceeding for any violation of such laws. And a penalty was imposed upon every person transacting business as a public warehouseman of the first class without first procuring a license, or continuing in such business after his license had been revoked, of not less than one hundred or more than five hundred dollars for each day on which the business was thus carried on. The court was also authorized to refuse for one year to renew the license, or to grant a new one to any person whose license had been revoked. The maximum of charges prescribed by the act for the receipt and storage of grain was different from that which the defendants had previously charged, and which had been agreed to by the owners of the grain.

More extended periods of storage were required of them than they formerly gave for the same charges. What they formerly charged for the first twenty days of storage, the act allowed them to charge only for the first thirty days of storage; and what they formerly charged for each succeeding ten days after the first twenty, the act allowed them to charge only for each succeeding fifteen days after the first thirty. The defendants, deeming that they had a right to use their own property in such manner as they desired, not inconsistent with the equal right of others to a like use, and denying the power of the legislature to fix prices for the use of their property and their services in connection with it, refused to comply with the act by taking out the license and giving the bond required; but continued to carry on the business and to charge for receiving and storing grain such prices as they had been accustomed to charge, and as had been agreed upon between them and the owners of the grain. For thus transacting their business without procuring a license as required by the act, they were prosecuted and fined, and the judgment against them was affirmed by the supreme court of the state.

The question presented, therefore, is one of the greatest importance: whether it is within the competency of a state to fix the compensation which an individual may receive for the use of his own property in his private business and for his services in connection with it?

The declaration of the constitution of 1870, that private buildings used for private purposes shall be deemed public institutions, does not make them so. The receipt and storage of grain in a building erected by private means for that purpose does not constitute the building a public warehouse. There is no magic in the language, though used by a constitutional convention, which can change a private business into a public

one, or alter the character of the building in which the business is transacted. A tailor's or a shoemaker's shop would still retain its private character even though the assembled wisdom of the state should declare by organic act or legislative ordinance that such a place was a public workshop, and that the workmen were public tailors or public shoemakers. One might as well attempt to change the nature of colors by giving them a new designation. The defendants were no more public warehousemen, as justly observed by counsel, than the merchant who sells his merchandise to the public is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith; and it was a strange notion that by calling them so they would be brought under legislative control.

The supreme court of the state — divided, it is true, by three to two of its members—has held that this legislation was a legitimate exercise of state authority over private business; and the Supreme Court of the United States, two only of its members dissenting, has decided that there is nothing in the Constitution of the United States, or its recent amendments, which impugns its validity. It is, therefore, with diffidence I presume to question the soundness of the decision.

The validity of the legislation was, among other grounds, assailed in the state court as being in conflict with that provision of the state constitution which declares that no person shall be deprived of life, liberty, or property without due process of law, and with that provision of the 14th amendment of the Federal Constitution which imposes a similar restriction upon the action of the state. The state court held in substance that the constitutional provision was not violated so long as the owner was not deprived of the title and possession of his property; and that it did not deny to the legislature the power to make all needful rules and regulations respecting the use and enjoyment of the

property, referring, in support of the position, to instances of its action in prescribing the interest on money, in establishing and regulating public ferries and public mills, and fixing the compensation in the shape of tolls, and in delegating power to municipal bodies to regulate the charges of hackmen and draymen and the weight and price of bread. In this court the legislation was also assailed on the same ground, our jurisdiction arising upon the clause of the 14th amendment ordaining that no state shall deprive any person of life, liberty, or property without due process of law. But it would seem from its opinion that the court holds that property loses something of its private character when employed in such a way as to be generally useful. The doctrine declared is that property "becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large;" and from such clothing the right of the legislature is deduced to control the use of the property and to determine the compensation which the owner may receive for it. When Sir Matthew Hale, and the sages of the law in his day, spoke of property as affected by a public interest, and ceasing from that cause to be *juris privati* solely, that is, ceasing to be held merely in private right, they referred to property dedicated by the owner to public uses, or to property the use of which was granted by the government, or in connection with which special privileges were conferred. Unless the property was thus dedicated, or some right bestowed by the government was held with the property, either by specific grant or by prescription of so long a time as to imply a grant originally, the property was not affected by any public interest so as to be taken out of the category of property held in private right. But it is not in any such sense that the terms "clothing property with a public interest" are used in this case. From

the nature of the business under consideration—the storage of grain—which, in any sense in which the words can be used, is a private business, in which the public are interested only as they are interested in the storage of other products of the soil, or in articles of manufacture, it is clear that the court intended to declare that whenever one devotes his property to a business which is useful to the public—"affects the community at large"—the legislature can regulate the compensation which the owner may receive for its use and for his own services in connection with it. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." The building used by the defendants was for the storage of grain; in such storage, says the court, the public has an interest; therefore the defendants, by devoting the building to that storage, have granted to the public an interest in that use, and must submit to have their compensation regulated by the legislature.

If this be sound law, if there be no protection either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and according to the doctrine announced, the legislature may fix the rent of all tenements used for residences without reference to the cost

of their erection. If the owner does not like the rates prescribed he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and "he may withdraw his grant by discontinuing the use; but so long as he maintains the use he must submit to the control." The public is interested in the manufacture of cotton, woolen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States.

The doctrine of the state court, that no one is deprived of his property, within the meaning of the constitutional inhibition, so long as he retains its title and possession, and the doctrine of this court, that whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with a public interest and ceases to be *juris privati* only, appear to me to destroy for all useful purposes the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no further than to prevent a deprivation of title and possession, and allows a deprivation of

use and the fruits of that use, it does not merit the encomiums it has received. Unless I have misread the history of the provision now incorporated into all our state constitutions, and by the fifth and fourteenth amendments into our Federal Constitution, and have misunderstood the interpretation it has received, it is not thus limited in its scope and thus impotent for good. It has a much more extended operation than either court, state or federal, has given to it. The provision, it is to be observed, places property under the same protection as life and liberty. Except by due process of law no state can deprive any person of either. The provision has been supposed to secure to every individual the essential conditions for the pursuit of happiness, and for that reason has not been heretofore, and should never be, construed in any narrow or restricted sense.

No state "shall deprive any person of life, liberty, or property without due process of law," says the 14th amendment to the Constitution. By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation, not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of

others, as his judgment may dictate for the promotion of his happiness—that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment.

The same liberal construction which is required for the protection of life and liberty, in all particulars in which life and liberty are of any value, should be applied to the protection of private property. If the legislature of a state, under pretence of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction. If, for instance, the owner is prohibited from using his building for the purposes for which it was designed, it is of little consequence that he is permitted to retain the title and possession. Or if he is compelled to take as compensation for its use less than the expenses to which he is subjected by its ownership, he is for all practical purposes deprived of the property, as effectually as if the legislature had ordered his forcible dispossession. If it be admitted that the legislature has any control over the compensation, the extent of that compensation becomes a mere matter of legislative discretion. The amount fixed will operate as a partial destruction of the value of the property, if it fall below the amount which the owner would obtain by contract, and, practically, as a complete destruction, if it be less than the cost of retaining its possession. There is, indeed, no protection of any value under the constitutional provision which does not extend to the use and income of the property as well as to its title and possession.

This court has heretofore held in many instances that a constitutional provision intended for the protection of rights of private property should be liberally

construed. It has so held in the numerous cases where it has been called upon to give effect to the provision prohibiting the states from legislation impairing the obligation of contracts ; the provision being construed not only to secure the contract itself from direct attack, but all the essential incidents which give it value and enable its owner to enforce it. Thus, in Bronson vs. Kinzie, reported in the 1st of Howard, it was held that an act of the legislature of Illinois giving to a mortgagor twelve months within which to redeem his mortgaged property from a judicial sale, and prohibiting its sale for less than two-thirds of its appraised value, was void as applied to mortgages executed prior to its passage. It was contended, in support of the act, that it affected only the remedy of the mortgagee and did not impair the contract; but the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void and one which took away all remedy to enforce it, or encumbered the remedy with conditions that rendered it useless or impracticable to pursue it. And, referring to the constitutional provision, the court said, speaking through Mr. Chief Justice Taney, that "it would be unjust to the memory of the distinguished men who framed it to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts and to secure their faithful execution throughout this Union by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used and to sanction a distinction between the right and the remedy which would render this provision illusive and nugatory, mere words of form, affording no protection and producing no practical result."

And in Pumpelly vs. Green Bay Company, reported in the 13th of Wallace, the language of the court is equally emphatic. That case arose in Wisconsin, the constitution of which declares, like the constitutions of nearly all the states, that private property shall not be taken for public use without just compensation; and this court held that the flooding of one's land by a dam constructed across a river under a law of the state was a taking within the prohibition, and required compensation to be made to the owner of the land thus flooded. The court, speaking through Mr. Justice Miller, said: "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction on the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." The views expressed in these citations, applied to this case, would render the constitutional provision invoked by the defendants effectual to protect them in the uses, income, and revenues of their property as well as in its title and pos-

session. The construction actually given by the state court and by this court makes the provision, in the language of Taney, a protection to "a mere barren and abstract right, without any practical operation upon the business of life," and renders it "illusive and nugatory, mere words of form, affording no protection and producing no practical result."

The power of the state over the property of the citizen under the constitutional guaranty is well defined. The state may take his property for public uses upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non lædas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the state over the property of the citizen does not extend beyond such limits.

It is true that the legislation which secures to all protection in their rights and the equal use and enjoyment of their property embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community comes within its scope, and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the

state, which from the language often used respecting it one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the state, or the municipality exercising a delegated power from the state, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theater, church, or public hall, it may prescribe ample means of egress so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance; whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go in like manner through

the whole round of regulations authorized by legislation, state or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the state in exercising its power of prescribing the compensation only determines the conditions upon which its concession shall be enjoyed. When the privilege ends the power of regulation ceases.

Jurists and writers on public law find authority for the exercise of this police power of the state and the numerous regulations which it prescribes in the doctrine already stated, that every one must use and enjoy his property consistently with the rights of others and the equal use and enjoyment by them of their property. "The police power of the state," says the Supreme Court of Vermont, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the state. According to the maxim, *sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action *to define the mode and manner in which every one may so use his own as not to injure others.*"* "We think it a settled principle growing out of the nature of well ordered civil society," says the Supreme Court of Massachusetts, "that every holder of property, however

* Thorpe vs. Rutland & Burlington R. R. Co., 27 Vt., 149.

absolute and unqualified may be his title, holds it under the implied liability that his use of it *shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.*"* In his commentaries, after speaking of the protection afforded by the Constitution to private property, Chancellor Kent says: "But though property be thus protected, it is still to be understood that the lawgiver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public.* The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interest must be subservient to the general interests of the community.*"†

The italics in these citations are mine. The citations show what I have already stated to be the case, that the regulations which the state, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use or for the services of the owner in connection with it.

There is nothing in the character of the business of the defendant as warehousemen which called for the interference complained of in this case. Their buildings are not nuisances; their occupation of receiving and

* Commonwealth vs. Alger, 7 Cushing, 84.

† 2 Kent, 340.

storing grain infringes upon no rights of others, disturbs no neighborhood, infects not the air, and in no respect prevents others from using and enjoying their property as to them may seem best. The legislation in question is nothing less than a bold assertion of absolute power by the state to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise. "That government," says Story, "can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."* The decision of the court in this case gives unrestrained license to legislative will.

The several instances mentioned by counsel in the argument and by the court in its opinion, in which legislation has fixed the compensation which parties may receive for the use of their property and services, do not militate against the views I have expressed of the power of the state over the property of the citizen. They were mostly cases of public ferries, bridges, and turnpikes, of wharfingers, hackmen, and draymen, and of interest on money. In all these cases, except that of interest on money, which I shall presently notice, there was some special privilege granted by the state or municipality; and no one, I suppose, has ever contended that the state had not a right to prescribe the conditions upon which such privilege should be enjoyed. The state in such cases exercises no greater right than an individual may exercise over the use of his own property when leased or loaned to others

* Wilkeson vs. Leland, 2 Peters, 657.

The conditions upon which the privilege shall be enjoyed being stated or implied in the legislation authorizing its grant, no right is, of course, impaired by their enforcement. The recipient of the privilege in effect stipulates to comply with the conditions. It matters not how limited the privilege conferred, its acceptance implies an assent to the regulation of its use and the compensation for it. The privilege which the hackman and drayman have to the use of stands on the public streets, not allowed to the ordinary coachman or laborer with teams, constitutes a sufficient warrant for the regulation of their fares. In the case of the warehousemen of Chicago, no right or privilege is conferred by the government upon them, and hence no assent of theirs can be alleged to justify any interference with their charges for the use of their property.

The quotations from the writings of Sir Matthew Hale, so far from supporting the positions of the court, do not recognize the interference of the government even to the extent which I have admitted to be legitimate. They state merely that the franchise of a public ferry belongs to the king, and cannot be used by the subject except by license from him, or prescription time out of mind; and that when the subject has a public wharf by license from the king, or from having dedicated his private wharf to the public, as in the case of a street opened by him through his own land, he must allow the use of the wharf for reasonable and moderate charges. Thus, in the first quotation, which is taken from his treatise "De Jure Maris," Hale says that the king has a "right of franchise or privilege, that no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge,

and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a publick regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is fineable." Of course one who obtains a license from the king to establish a public ferry at which "every man for his passage pays a toll," must take it on condition that he charge only reasonable toll, and indeed subject to such regulations as the king may prescribe.

In the second quotation, which is taken from his treatise "De Portibus Maris," Hale says: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the king, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by the publick interest." The purport of which is that if one have a public wharf, by license from the government or his own dedication, he must exact only reasonable compensation for its use. By its

dedication to public use a wharf is as much brought under the common-law rule of subjection to reasonable charges as it would be if originally established or licensed by the crown. All property dedicated to public use by an individual owner, as in the case of land for a park or street, falls at once, by force of the dedication, under the law governing property appropriated by the government for similar purposes.

I do not doubt the justice of the encomiums passed upon Sir Matthew Hale as a learned jurist of his day, but the pertinency of his observations upon *public* ferries and *public* wharves, found in his treatises on The Rights of the Sea and on The Ports of the Sea, to the questions presented by the warehousing law of Illinois undertaking to regulate the compensation which the owners of *private* property used for *private* purposes shall receive, is not strikingly obvious.

The principal authority cited in support of the ruling of the court is that of Alnutt vs. Inglis, decided by the King's Bench and reported in the 12th of East. But that case, so far from sustaining the ruling, establishes, in my judgment, the doctrine that every one has a right to charge for his property, or for its use, whatever he pleases, unless he enjoys in connection with it some right or privilege from the government not accorded to others; and even then it only decides what is above stated in the quotations from Sir Matthew Hale, that he must submit, so long as he retains the right or privilege, to reasonable rates. In that case the London Dock Company, under certain acts of Parliament, possessed the exclusive right of receiving imported goods into their warehouses before the duties were paid; and the question was whether the company was bound to receive them for a reasonable reward or whether it could arbitrarily fix its compensation. In deciding the case, the Chief Justice, Lord Ellenborough, said: "There is no doubt that the general

principle is favored both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." And coming to the conclusion that the company's warehouses were invested with "the monopoly of a public privilege," he held that by law the company must confine itself to take reasonable rates; and added that if the crown should thereafter think it advisable to extend the privilege more generally to other persons and places, so that the public would not be restrained from exercising a choice of warehouses for the purpose, the company might be enfranchised from the restriction which attached to a monopoly; but so long as its warehouses were the only places which could be resorted to for that purpose, the company was bound to let the trade have the use of them for a reasonable hire and reward. The other judges of the court placed their concurrence in the decision upon the ground that the company possessed a legal monopoly of the business, having the only warehouses where goods imported could be lawfully received without previous payment of the duties. From this case it appears that it is only where some privilege in the bestowal of the government is enjoyed in connection with the property, that it is affected with a public interest in any proper sense of the term. It is the public privilege conferred with the use of the property which creates the public interest in it.

In the case decided by the Supreme Court of Alabama, where a power granted by the city of Mobile to license bakers and to regulate the weight and price of bread, was sustained so far as regulating the weight of the bread was concerned, no question was made as

to the right to regulate the price.* There is no doubt of the competency of the state to prescribe the weight of a loaf of bread, as it may declare what weight shall constitute a pound or a ton. But I deny the power of any legislature under our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article it may as to all articles, and the prices of everything from a calico gown to a city mansion may be the subject of legislative direction.

Other instances of a similar character may no doubt be cited of attempted legislative interference with the rights of property. The act of Congress of 1820, mentioned by the court, is one of them. There Congress undertook to confer upon the city of Washington power to regulate the rates of wharfage at private wharves, and the fees for sweeping chimneys. Until some authoritative adjudication is had upon these and similar provisions, I must adhere, notwithstanding the legislation, to my opinion that those who own property have the right to fix the compensation at which they will allow its use, and that those who control services have a right to fix the compensation at which they will be rendered. The chimney-sweeps may, I think, safely claim all the compensation which they can obtain by bargain for their work. In the absence of any contract for property or services the law allows only a reasonable price or compensation, but what is a reasonable price in any case will depend upon a variety of considerations, and is not a matter for legislative determination.

The practice of regulating by legislation the interest receivable for the use of money, when considered with reference to its origin, is only the assertion of a right of the government to control the extent to which a privilege granted by it may be exercised and enjoyed. By

* 3 Ala., 137.

the ancient common law it was unlawful to take any money for the use of money; all who did so were called usurers, a term of great reproach, and were exposed to the censure of the church. And if after the death of a person it was discovered that he had been a usurer whilst living, his chattels were forfeited to the king, and his lands escheated to the lord of the fee. No action could be maintained on any promise to pay for the use of money, because of the unlawfulness of the contract. Whilst the common law thus condemned all usury, Parliament interfered and made it lawful to take a limited amount of interest. It was not upon the theory that the legislature could arbitrarily fix the compensation which one could receive for the use of property, which by the general law was the subject of hire for compensation, that Parliament acted, but in order to confer a privilege which the common law denied. The reasons which led to this legislation originally have long since ceased to exist, and if the legislation is still persisted in, it is because a long acquiescence in the exercise of a power, especially when it was rightfully assumed in the first instance, is generally received as sufficient evidence of its continued lawfulness.*

There were also recognized in England by the ancient common law certain privileges as belonging to the lord of the manor, which grew out of the state of the country, the condition of the people, and the relation existing between him and his tenants under the fendal system. Among these was the right of the lord

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* 10 Bacon's Abridgment, 264. The statute of 13 Elizabeth, C. 8, which allows ten per cent. interest, recites "that all usury being forbidden by the law of God is sin and detestable;" and the statute of 21 James the First, reducing the rate to eight per cent., provided that nothing in the law should be "construed to allow the practice of usury in point of religion or conscience," a clause introduced, it is said, to satisfy the bishops, who would not vote for the bill without it.

to compel all the tenants within his manor to grind their corn at his mill. No one, therefore, could set up a mill except by his license or by the license of the crown, unless he claimed the right by prescription, which presupposed a grant from the lord or crown, and, of course, with such license went the right to regulate the tolls to be received.* Hence originated the doctrine which at one time obtained generally in this country, that there could be no mill to grind corn for the public without a grant or license from the public authorities. It is still, I believe, asserted in some states. This doctrine being recognized, all the rest followed. The right to control the toll accompanied the right to control the establishment of the mill.

It requires no comment to point out the radical differences between the cases of public mills and interest on money and that of the warehouses in Chicago. No prerogative or privilege of the crown to establish warehouses was ever asserted at the common law. The business of a warehouseman was at common law a private business, and is so in its nature. It has no special privileges connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business. No reason can be assigned to justify legislation interfering with the legitimate profits of that business that would not equally justify an intermeddling with the business of every man in the community, so soon at least as his business became generally useful.

I am of opinion that the judgment of the Supreme Court of Illinois should be reversed.

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STRONG, J.—When the judgment in this case was announced by direction of a majority of the court, it was well known by all my brethren that I did not

* Woolrych on the Law of Waters, chap. vi., of Mills.

concur in it. It had been my purpose to prepare a dissenting opinion, but I found no time for the preparation, and I was reluctant to dissent in such a case without stating my reasons. Mr. Justice Field has now stated them as fully as I can, and I concur in what he has said.

SUPREME COURT OF THE UNITED STATES.

"THE GRANGER CASES."

The Chicago, Burlington and Quincy Railroad Company
vs.
M. E. Cutts, Attorney-General of Iowa.

Appeal from the Circuit Court of the United States for the District of Iowa.

And five other railroad cases.

Mr. Justice FIELD dissenting.

I dissent from the judgments of the court in the several railroad cases arising in the states of Illinois, Wisconsin, Iowa, and Minnesota, commonly known as "The Granger Cases," and from the reasons on which the judgments are founded. These cases involved a consideration of the charters of the different companies, and of the extent of the power of the legislature over them, as well in the absence of any reservation of a right to alter or repeal them, as when such reservation was embodied in them or in the constitutions under which they were granted. On the one hand, it was contended that the legislature of each state possessed the power, irrespective of any reservation, to regulate at its discretion the compensation which the companies chartered by it might charge for the carriage of persons and merchandise, without reference to the expenses of the carriage, or the obligations incurred in the construction of the roads. Unlimited power over every railroad corporation in respect to the business it should carry on, and the compensation it should receive, was asserted, except where these were specifically designated and permanently fixed in the charter.

On the other hand, it was contended that the charters of the companies constituted contracts between the states creating them and the corporators, within the provision of the Federal Constitution prohibiting legislation impairing the obligation of contracts; and that they could not, therefore, be changed in any material particular, unless the power to make the change was reserved in the charters or in some constitutional provision of the states; that the right of the companies to operate their respective roads and charge reasonable compensation for transportation of persons and merchandise was the essential franchise granted, and that what was reasonable compensation in any case, depending, as it must, upon a variety of considerations upon which the parties had a right to be heard, was a judicial question and not a matter for legislative determination.

It was also contended, that the clause in the constitution of some of the states, reserving a power to their legislatures to alter acts of incorporation, did not authorize an entire change in the charter of a corporation or its destruction; and that any just interpretation of the clause would prevent such a regulation of fares as would take from a company the power to meet its just obligations by which the means were obtained to construct and equip its road.

The questions thus presented are of the gravest importance, and their solution must materially affect the value of property invested in railroads to the amount of many hundreds of millions, and will have a great influence in encouraging or repelling future investments in such property. They were ably and elaborately argued by eminent counsel, and nothing was omitted which could have informed or enlightened the court. The opportunity was presented for the court to define the limits of the power of the state over its corporations after they have expended money and incur-

red obligations upon the faith of the grants to them, and the rights of the corporators, so that on the one hand the property interests of the stockholder would be protected from practical confiscation, and on the other hand the people would be protected from arbitrary and extortionate charges. This has not been done, but the doctrine advanced in the Chicago Elevator Case has been applied to all railroad companies and their business, and they are thus practically placed at the mercy of the legislature of every state.

In the Elevator Case, the court has declared as its solemn judgment that property "becomes clothed with a public interest when it is used in such a manner as to be of public consequence and affect the community at large," and thus loses enough of its private character to make its use subject to regulation, not only in the manner of the use, but as to the compensation which the owner may receive for it. "When, therefore," says the court, "one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." There is no business or enterprise involving expenditures to any extent which is not of public consequence and which does not affect the community at large. There is no industry or employment, no trade or manufacture, and no avocation which does not in a greater or less extent affect the community at large, and in which the public has not an interest in the sense used by the court.

There is no doubt of the power of the legislature to prescribe in the charter of any corporation the compensation it may receive for services rendered, or to reserve the power to regulate such compensation sub-

sequently. The power to prescribe the conditions of use and enjoyment necessarily accompanies the power to grant. But the charter of a corporation being a contract, a sufficient consideration for the privileges and franchises conferred being found in the duties and liabilities assumed by the corporators, the subsequent power of the legislature is restrained by its terms. This has been so often judicially declared that it has been supposed to be no longer open to discussion. The first question, therefore, for consideration in all cases where legislation affects the constitution of a corporation, or its beneficial operation, is, what is the true construction of its charter, and consequently, what privileges does it confer and what restraint does it impose upon legislative interference. The rights and privileges implied in the contract are equally as inviolable as those expressed. This question is not met by the court in its opinion, the several cases being disposed of by the novel doctrine announced in the Elevator Case, that the legislature has a right to regulate the compensation for the use of all property, and for services in connection with it, the use of which affects the "community at large," and the further doctrine, equally novel, that although the charter of a company confers the power to make reasonable charges, the whole matter is reserved to be regulated by the state in its discretion.

If it be admitted that the reserved power to alter all laws creating corporations authorizes the legislature to regulate the rates of charges of a railroad company for the transportation of persons and property, it should not, in common honesty, be so used as to destroy or essentially impair the value of mortgages and other obligations executed under express authority of the state. The reserved power has not generally been supposed to authorize the legislature to revoke the contracts of the corporation with third parties, or to

impair any vested rights acquired under them. But no considerations of this kind are of any weight under the decision in the Elevator Case.

So long as that decision remains, it will be a waste of words to discuss the questions argued by counsel in these cases. That decision in its wide sweep practically destroys all the guaranties of the Constitution and of the common law invoked by counsel for the protection of the rights of the railroad companies. Of what avail is the constitutional provision that no state shall deprive any person of his property except by due process of law, if the state can, by fixing the compensation which he may receive for its use, take from him all that is valuable in the property? To what purpose can the constitutional prohibition upon the state against impairing the obligation of contracts be invoked, if the state can, in the face of a charter authorizing a company to charge reasonable rates, prescribe what rates shall be deemed reasonable for services rendered? That decision will justify the legislature in fixing the price of all articles and the compensation for all services. It sanctions intermeddling with all business and pursuits and property in the community, leaving the use and enjoyment of property and compensation for its use to the discretion of the legislature. Having already expressed my objections to that decision in a dissenting opinion, I need not repeat them here.

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STRONG, J.—I concur in this dissent.